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Trusts and Administration

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TRUSTS AND ADMINISTRATION

CHARLES L. KNAPP

LOUISIANA has recently revised and recodified its law of trusts.¹ In New York, the Commission on Estates has issued another series of valuable reports,² and its efforts have produced several legislative actions.³ Alaska has adopted the Uniform Common Trust Fund Act.⁴

Significant cases during the year included a rejection by Ohio of the Totten trust doctrine as developed in New York and other states,⁵ a Minnesota holding limiting the effectiveness of such trusts against the surviving spouse,⁶ and important cases from Hawaii⁷ and Delaware⁸ involving trustees' powers of investment and sale.

I

CREATION

Sixty years have now passed since *Matter of Totten*,⁹ and still the decisions adopting or rejecting New York's view of the "tentative" savings account trust continue to appear. Late in 1963, the Ohio Supreme Court faced the question whether valid trusts had been created by a mere indication on various savings account passbooks that decedent was "trustee" for named individuals. In *In re Hoffman's Estate*,¹⁰ the Ohio court chose to follow the lead of Massachusetts,¹¹ holding that some additional clear showing of intent would be required before even

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1. La. Rev. Stat. §§ 9:1721-2252 (Supp. 1964). See Robertson, Some Interesting Features of the Proposed Trust Code, 24 La. L. Rev. 712 (1964).

2. N.Y. Temporary Comm'n on Law of Estates, Third Report, Legislative Doc. No. 19 (1964). See text accompanying notes 25 and 31, *infra*.

3. The most important being N.Y. Deced. Est. Law § 127 (Fiduciaries' Powers Act) (Supp. 1964) and N.Y. Real Prop. Law §§ 130-68 (Supp. 1964) (completely revising law governing powers of appointment); N.Y. Pers. Prop. Law § 11(c) (Supp. 1964) and N.Y. Real Prop. Law § 42-d, 96, 97, 99, 166, 174 (Supp. 1964) (purposes for which trusts may be created; see note 32 *infra*); N.Y. Pers. Prop. Law § 15 (Supp. 1964) and N.Y. Real Prop. Law § 103 (Supp. 1964) (relating to spendthrift trusts, see note 54 *infra*); N.Y. Surr. Ct. Act §§ 254, 285-a(3), (4)(6)(b), 285-b(2), (4), (6)(b) (Special Pamphlet 1964).

4. Alaska Comp. Laws Ann. §§ 06.35.010-06.35.050 (Supp. 1964).

5. See text accompanying notes 10-11 *infra*.

6. See text accompanying notes 16-19 *infra*.

7. See text accompanying notes 78-82 *infra*.

8. See text accompanying notes 103-108 *infra*.

9. 179 N.Y. 112, 71 N.E. 748 (1904).

10. 175 Ohio St. 363, 195 N.E.2d 106 (1963), favorable Comment, 25 Ohio St. L.J. 283 (1964).

11. See, e.g., *O'Hara v. O'Hara*, 291 Mass. 75, 195 N.E. 909 (1935).

a revocable trust would be recognized. In Illinois, however, the appellate court has declared that Illinois will follow the New York rule¹² in upholding the validity of such trusts, based on the form of the deposit alone.¹³ In New Jersey, despite the victory of the legislature in a long struggle over the validity of Totten trusts,¹⁴ a litigant found one more ground for an ingenious (but unsuccessful) attack on the validity of such a trust.¹⁵

Judges have also continued to wrestle with the problem of protecting the surviving spouse (usually the widow) against "illusory" inter vivos transfers while at the same time preserving freedom of alienation of property. In Minnesota, a widow's attempt to reach Totten trusts created by her late husband resulted in an unusually imaginative decision by the Minnesota Supreme Court. In *In re Estate of Jeruzal v. Jeruzal*,¹⁶ Justice Murphy, after examining the various views as to the widow's rights against such trusts,¹⁷ expressed the court's opinion that a widow should be allowed to invade the corpus to the extent of her statutory elective share.¹⁸ Observing, however, that so to hold would be unfair to those who might have created Totten trusts in reliance on previous Minnesota decisions in which no such rule appeared, the court declared that it would only so hold in the

12. Also the rule approved in Restatement (Second), Trusts § 58, comment a (1959).

13. *In re Petralia's Estate*, 48 Ill. App. 2d 122, 198 N.E.2d 200 (1964). Illinois has adopted a lenient view toward revocable inter vivos trusts in general. See *Farkas v. Williams*, 5 Ill. 2d 417, 125 N.E.2d 600 (1955).

14. See 1963 Ann. Survey Am. L. 380; 1962 Ann. Survey Am. L. 487-88; 1961 Ann. Survey Am. L. 408-09.

15. *Matter of Estate of Kloppenberg v. Massey*, 82 N.J. Super. 117, 196 A.2d 800 (App. Div. 1964). In a suit by the beneficiary, the defendant (administrator c.t.a. and heir of the decedent) claimed he had in good faith relied on the apparent invalidity of such trusts, so that it would now be unjust to apply the latest decision, which finally upheld a 1949 validating statute, retrospectively against him and his fellow heirs (they having already spent the money which was in the account). The court rejected this defense, pointing out that at the time of defendant's conduct the validity of the 1949 statute had not been conclusively decided, and a later, even more explicit statute had not even reached the courts.

16. 130 N.W.2d 473 (Minn. 1964).

17. The New York view is, apparently, that Totten trusts will generally not be vulnerable to claims by the surviving spouse. *Matter of Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951). The Maryland decisions proceed on a case-by-case basis, weighing the equitable factors present. *Whittington v. Whittington*, 205 Md. 1, 106 A.2d 72 (1954). The Restatement favors allowing the widow to invade such trusts to the extent of her elective share. Restatement (Second), Trusts § 58, comment c (1959). Pennsylvania now reaches a similar result by statute. Pa. Stat. Ann. tit. 20, § 301.11 (1950).

18. Although the Minnesota court stated that Pennsylvania has adopted the Restatement rule, the Restatement (which Minnesota apparently will follow) does differ from Pennsylvania in at least one important respect: it appears to require that the entire testamentary estate be first exhausted in making up the widow's forced share before any Totten trusts are invaded. Compare Restatement (Second), Trusts § 58, comment c (1959), with Pa. Stat. Ann. tit 20, § 301.11(b) (1950).

future—and then only as to any case where the creator of a Totten trust dies *after the end of the next session of the Minnesota legislature*.¹⁹ In Kansas, the Supreme Court held that a widow may assert a right to her distributive share of property placed by her husband in a revocable inter vivos trust.²⁰ Although the trust in question also reserved to the settlor the power to amend, to control investments, and to receive the income for life, the court's opinion that the trust was "colorable only . . . fallacious, illusive and deceiving"²¹ seems to be based entirely on the reservation of the power to revoke. If so, it is contrary to the apparent trend of cases in this area,²² and the decision has been severely criticized.²³ In New York, the Commission on Estates has recommended broad legislation, modeled generally on the Pennsylvania statute,²⁴ to permit a surviving spouse to elect against various specified types of inter vivos transfers having significant testamentary aspects.²⁵

Other interesting cases decided during 1964 involved questions of insurance trusts,²⁶ proof of parol trusts,²⁷ undue influence and in-

19. The court noted that the widow in the instant case was not left destitute, and stated that it was delaying its adoption of the Restatement rule to give the legislature "an opportunity to provide for it by statute"; presumably, a contrary action by the legislature in 1965 would also be respected.

20. *Ackers v. First Nat'l Bank*, 192 Kan. 319, 387 P.2d 840 (1963), rehearing denied, 192 Kan. 471, 389 P.2d 1 (1964). Compare *Edgar v. Fitzpatrick*, 377 S.W.2d 314 (Mo. 1964).

21. *Ackers v. First Nat'l Bank*, supra note 20, at 333, 387 P.2d at 851.

22. E.g., *Cherniack v. Home Nat'l Bank & Trust Co.*, 151 Conn. 367, 198 A.2d 58 (1964). See *Smyth v. Cleveland Trust Co.*, 172 Ohio St. 489, 179 N.E.2d 60 (1961). See also Scott, *The Revocable Trust and the Surviving Spouse's Statutory Share in Colorado*, 36 U. Colo. L. Rev. 464 (1964).

23. Comment, 13 Kan. L. Rev. 145 (1964).

24. Supra note 17.

25. Including joint tenancies, Totten trusts, gifts causa mortis and revocable inter vivos trusts. N.Y. Temporary Comm'n on Law of Estates, Third Report, Legislative Doc. No. 19 (App. A) (1964). The Kentucky legislature has just adopted a statute validating (as against assertions of testamentary character) inter vivos trusts in which broad powers are reserved, but the statute does not expressly deal with the rights of a surviving spouse. Ky. Rev. Stat. § 394.010(2)-(3) (1964).

26. *Pavy v. Peoples Bank & Trust Co.*, 195 N.E.2d 862 (Ind. 1964) (holding that no valid trust was created when husband changed beneficiary of his insurance from wife to trust company, which apparently resulted in the diversion of all the suicide-husband's insurance proceeds to his creditors and away from his widow and children, who receive virtually nothing else under the will); *Cooney v. Montana*, 196 N.E.2d 202 (Mass. 1964) (upholding an oral trust in life insurance proceeds against sister of decedent in favor of his children); *Flack v. Prudential Ins. Co. of America*, 42 Misc. 2d 512, 248 N.Y.S.2d 323 (Sup. Ct. 1964) (resulting trust where beneficiary under policy was designated as "trustee under an agreement dated September 3, 1935," but no trust agreement of that date was found). The Maryland legislature has specifically validated the trust having as its sole res a right to life insurance proceeds or to death benefits under a pension, stock-bonus or profit-sharing plan. Md. Sess. Laws 1964, ch. 105, at 302.

27. *McDaniel v. Fordham*, 261 N.C. 423, 135 S.E.2d 22 (1964); *Miele v. Miele*, 197 A.2d 787 (Vt. 1964).

capacity,²⁸ debt or contract relationship as distinguished from trust,²⁹ and various miscellaneous problems.³⁰

In New York, the historic statute limiting the purposes for which a trust of real property may be created³¹ has finally been repealed and replaced with a simple authorization to create such trusts "for any lawful purpose or purposes."³²

II

TERMINATION

Although a court of equity will often terminate an irrevocable trust at the request of all beneficiaries,³³ this may be impossible where there are unborn contingent beneficiaries, or where some living beneficiaries are under a legal disability.³⁴ Both problems were presented in the recent case of *Rhode Island Hosp. Trust Co. v. Smith*.³⁵ Under decedent's will, a trust was created to pay the income to decedent's two granddaughters until the younger or survivor should reach the age of thirty-five,³⁶ at which time the corpus was to be distributed to the decedent's grandchildren then living,³⁷ in equal shares, with the share of any deceased grandchild going to his or her issue by representation. There thus were contingent remainders in (at least) the issue of any of decedent's grandchildren. The two income beneficiaries peti-

28. *Citizens Fid. Bank & Trust Co. v. Leake*, 380 S.W.2d 264 (Ky. 1964) (fifteen-year's delay in asserting invalidity of trust not unjustified where father whose influence is complained of was still alive; influence may be "benign" and yet be undue and vitiating); *Owings v. Owings*, 233 Md. 357, 196 A.2d 908 (1964) (aged grantor failed in effort to set aside trust deed to son and daughter on ground of undue influence).

29. *Dixon v. White*, 327 F.2d 434 (7th Cir. 1964); *In re Myers' Estate*, 376 S.W.2d 219 (Mo. 1964) (collecting agent held a trustee).

30. *Bowden v. Teague*, 276 Ala. 142, 159 So. 2d 844 (1964) (interest of adverse possessor of land not suitable trust res; only an "expectancy"); *Roos v. Roos*, 203 A.2d 140 (Del. 1964) (reformation of trust after death of grantor on showing of unilateral mistake); *Valdes v. Muniz*, 164 So. 2d 876 (Fla. Dist. Ct. App. 1964) (no trust created by creditor's indefinite manifestation of intent that debt be paid to his grandson, on ground of testamentary character); *Matter of Estate of Greenspan*, 42 Misc. 2d 711, 248 N.Y.S.2d 745 (Surr. Ct. 1964) (testamentary trust failed to arise where broad powers were apparently to be exercised only by named trustee, who predeceased testator); *Rippstein v. Unthank*, 380 S.W.2d 155 (Tex. Civ. App. 1964), application for writ of error granted (gratuitous promise to make periodic payments, plus making first payment, created a trust valid against decedent's estate; holding seems to ignore traditional requirement of trust res).

31. See N.Y. Temporary Comm'n on Law of Estates, Third Report, Legislative Doc. No. 19 (App. P) (1964).

32. N.Y. Real Prop. Law § 96 (Supp. 1964) (effective June 1, 1965).

33. See 3 Scott, *Trusts* § 337 (2d ed. 1956).

34. See 1963 Ann. Survey Am. L. 381.

35. 198 A.2d 664 (R.I. 1964).

36. At the time of the decision on appeal, the younger was apparently thirty years old.

37. It does not appear whether there were (or may yet be) grandchildren other than the two income beneficiaries, each of whom had at least one living minor child.

tioned the court to terminate the trust, apparently for no stronger reason than that they wanted the present use of the principal. To protect the interest of the contingent beneficiaries, the petitioners offered to provide life insurance on their own lives in an amount equal to 150 per cent of the probable value of the trust corpus at the latest possible date for distribution. A guardian ad litem representing both the living minor contingent beneficiaries and those unborn joined in requesting termination on these terms, feeling that the contingent beneficiaries' interests would be furthered more by the proposed substitution of insurance than by continuation of the trust in its present form. However, the court did not reach the question of whether to allow the beneficiaries' interest to be so transformed in character because the petitioners were also blocked by the familiar rule that a trust will not be terminated (even with the consent of all beneficiaries) where to do so would violate the clear intent of the settlor.³⁸ The court felt that the testatrix had clearly intended as a primary concern that her granddaughters should not receive the trust principal until they were both at least thirty-five; the court therefore held that in this case such intent should govern.

Although a voluntary inter vivos trust is commonly held to be irrevocable unless the power of revocation is expressly reserved at the time of its creation,³⁹ a California statute reverses this rule, providing that a trust shall be revocable by the settlor in writing "unless expressly made irrevocable by the instrument creating the trust."⁴⁰ In a recent California case,⁴¹ the trust instrument expressly provided that the trust should be revocable during the lifetime of the settlor's father (who had furnished the insurance policies on his own life which—transmuted into proceeds—constituted the trust res), but did not expressly say the trust should become irrevocable at his death. It was

38. *Claffin v. Claffin*, 149 Mass. 19, 20 N.E. 454 (1889); see 3 Scott, *Trusts* § 337.3 (2d ed. 1956). For an interesting discussion of the history and rationale of the *Claffin* doctrine see Friedman, *The Dynastic Trust*, 73 *Yale L.J.* 547, 586 (1964). In a recent Louisiana case, *Lelong v. Succession of Lelong*, 164 So. 2d 671 (La. Ct. App. 1964), the beneficiaries of a testamentary trust argued that the ten-year trust should be terminated because contingencies unforeseen by the testator (large federal estate tax liability and diversion of two-thirds of the income to the testator's forced heirs under Louisiana Law) had resulted in the trust income being too small to develop the real property in trust in the manner contemplated by the testator. The court declined, but left the door open to such action in the future, should conditions justify it. Of interest is the fact that the persons seeking termination of the trust were the children of the testator, who as his forced heirs were in part responsible for the change in conditions on which they based their claim.

39. *Restatement (Second), Trusts* § 330 (1959).

40. Cal. Civ. Code § 2280. California is one of a handful of states with this rule. See 3 Scott, *Trusts* § 330, n.6 (2d ed. 1956).

41. *Wells Fargo Bank Am. Trust Co. v. Greuner*, 38 Cal. Rptr. 132 (Dist. Ct. App. 1964) (holding misstated in headnote).

held that the presumption of revocability prevailed, empowering the son to revoke the trust twenty-six years after his father's death. A recent New York lower court case⁴² held that Totten trusts were not revoked either by a will that omitted mention of the accounts⁴³ or by an oral declaration of revocation. The court based its decision upon the equivocal nature of the declaration of revocation in view of the surrounding circumstances, plus the apparent unreliability of the oral testimony offered; although there was some broad language in the opinion, the principle that an oral revocation may be upheld, if convincingly proved, seems not to be contradicted.⁴⁴

III

SPENDTHRIFT TRUSTS

An overwhelming majority of American jurisdictions recognizes, in general, the validity of spendthrift trusts,⁴⁵ but dispute continues over what reasons, if any, properly justify the anomalous spendthrift doctrine.⁴⁶ The decision in *Sherrow v. Brookover*,⁴⁷ in which the Ohio Supreme Court rejected the doctrine for that state, has met with general approval in a recent note.⁴⁸ On the other hand, another current note⁴⁹ argues for the spendthrift trust as a justifiable device for the protection of those—"the merely eccentric, retarded, gullible, elderly or irresponsible"—who are incapable of managing their own affairs, though not completely incompetent.⁵⁰ The traditional argument for the doctrine is a simpler one, based on the settlor's right to dispose of his property as he pleases: *cujus est dare, ejus est disponere*.⁵¹ However, nearly all states give certain kinds of claimants special rights against the interest of a spendthrift trust beneficiary,⁵² and to the extent that even such limited encroachment is permitted, the traditional

42. *Matter of Deneff's Will*, 44 Misc. 2d 947, 255 N.Y.S.2d 347 (Surr. Ct. 1964).

43. This is the usual result. See, e.g., *Matter of Campbell*, 4 Misc. 2d 643, 147 N.Y.S.2d 377 (Surr. Ct. 1955).

44. Cf. *Matter of Estate of Athanasiou*, 24 Misc. 2d 12, 202 N.Y.S.2d 675 (Surr. Ct. 1960).

45. N.Y. Temporary Comm'n on the Law of Estates, Second Report 358, Legislative Doc. No. 19 (1963).

46. An incredible amount of material has been written about the spendthrift trust; for what may be a complete bibliography as of 1963, see *id.* at 342, n.53.

47. 174 Ohio St. 310, 189 N.E.2d 90 (1963).

48. Note, *Spendthrift and other Protective Trusts in Ohio*, 33 U. Cinc. L. Rev. 281 (1964).

49. Note, *Rationale for the Spendthrift Trust*, 64 Colum. L. Rev. 1324 (1964).

50. And, as an "unavoidable consequence," for everyone else too; the author admits that no satisfactory test could be devised to separate the completely competent from the incompletely incompetent. *Id.* at 1334.

51. See, e.g., *In re Morgan's Estate*, 233 Pa. 228, 230, 72 A. 498, 499 (1909); 1A Bogert, *Trusts and Trustees* § 222 (1951); 4 Powell, *Real Property* § 557 (1964).

52. 1A Bogert, *Trusts and Trustees* § 223; 4 Powell, *Real Property* § 557 (1964). See Restatement (Second), *Trusts* § 157 (1959).

argument of the settlor's "right" is undermined. Last year the New York Court of Appeals upheld the validity of an "irrevocable assignment" by a beneficiary to his wife in satisfaction of her claim for support,⁵³ and this year the New York legislature further expanded the beneficiary's power of voluntary alienation. The new law⁵⁴ permits an income beneficiary to assign annual trust income in excess of \$10,000 to designated family members, with the consequent possible realization of greater after-tax income. As the statute permits such assignment only to close relatives of the beneficiary, impingement on the settlor's traditional "right to dispose" is more theoretical than real, because the result is one that the settlor presumably would have desired: after-tax income may be increased but the money is still kept in the family. Even so, the gradual accumulation of exceptions to the rule forbidding alienation may yet lead to a fundamentally new approach to the spendthrift trust, based on the real needs of the beneficiary rather than the property rights of the settlor.⁵⁵

As a result of an interesting procedural situation, the Supreme Court of Nebraska recently allowed the wife of the beneficiary of a spendthrift trust to collect out of the trust income the sum due her under a Florida maintenance judgment.⁵⁶ A valuable recent article by Professor Scott⁵⁷ investigates the question of which state's law applies when more than one state has a connection with a spendthrift trust and the laws of those states differ. He concludes that the law of the state in which administration of the trust has been fixed should generally determine both the beneficiary's and creditor's rights; if no state has been fixed for the administration of the trust, the applicable law should be that of the state which under all the circumstances has the most significant relation to the administration of the trust.

IV

INCOME AND PRINCIPAL

As noted in last year's report,⁵⁸ the New Jersey Supreme Court has dealt directly and refreshingly with the problem of allocating stock

53. *Matter of Knauth's Trust*, 12 N.Y.2d 259, 189 N.E.2d 482, 238 N.Y.S.2d 942 (1963), 1963 Ann. Survey Am. L. 384.

54. N.Y. Pers. Prop. Law § 15(1)b; N.Y. Real Prop. Law § 103(1)b.

55. See Note, *supra* note 49.

56. *Summers v. Summers*, 177 Neb. 389, 128 N.W.2d 829 (1964). The court observed that it would have to reach the opposite result if the question were simply one of whether the income of the trust could be invaded for the purpose of satisfying such a judgment. However, because neither the trustee nor the beneficiary had appealed a lower Nebraska court's earlier decision (also based on the Florida judgment) allowing such an invasion, the first question to be considered was whether that earlier decision was *res judicata* on the issue of plaintiff's right to invade the trust income; the court held that it was.

57. Scott, *Spendthrift Trusts and the Conflict of Laws*, 77 Harv. L. Rev. 845 (1964).

58. 1963 Ann. Survey Am. L. 385-86.

dividends between income and principal. For several years, New Jersey has had a statute, patterned after the original Uniform Principal and Income Act, which applies only prospectively.⁵⁹ The New Jersey courts had previously espoused the Pennsylvania rule of apportionment, but in *In re Arens*⁶⁰ the New Jersey Supreme Court discarded that rule as obsolete, declaring that the common law rule (applying to trusts created before the statute) would henceforth be the same as the rule set forth in the New Jersey statute, *as amended*.⁶¹ The New Jersey legislature has now provided (in response to a suggestion by the court in *Arens*) that small stock distributions at the rate of four per cent or less shall be allocated to income and all others to principal;⁶² under the *Arens* decision this amendment also becomes part of the common law of New Jersey.⁶³ It appears that New York will probably adopt a similar rule as to stock dividends at the rate of six per cent or less.⁶⁴ Pennsylvania has already done so.⁶⁵

A recent Pennsylvania case attacked (again) the constitutionality of that state's version of the Uniform Principal and Income Act.⁶⁶ This time the claim was made that the statute, by arbitrarily defining "principal" and "income," resulted (as to trusts created prior to its effective date) in an unconstitutional deprivation of property without due process because it created an irrebuttable presumption contrary to fact.⁶⁷ The court rejected this argument on the ground that the

59. N.J. Stat. Ann. § 3A:14A (1953).

60. 41 N.J. 364, 197 A.2d 1 (1964). See Barclay, Dividend Allocation Developments, 103 Trusts & Estates 272 (1964).

61. 41 N.J. at 384, 197 A.2d at 12.

62. N.J. Stat. Ann. § 3A:14A-4 (Supp. 1964).

63. It may be questioned whether New Jersey should have chosen four per cent as its dividing line. New York and Pennsylvania have both chosen six per cent, which seems more realistic in light of the present corporate practice, and uniformity among these three important commercial states might have helped avoid future proliferation of new "rules" in this area. See Niles, The New 6% Stock Distribution Rule, 102 Trusts & Estates 648 (1963).

64. The New York Commission on Estates has now consented to modification of the controversial new New York statute, which in its present form would allocate six per cent of all stock distributions (even classic "splits") to the income beneficiary. Pers. Prop. Law § 17(a) (Supp. 1964); effective date extended until June 1, 1965. See 153 N.Y.L.J. No. 44, p. 4, cols. 1-2. See generally, Barclay, *supra* note 60, at 273; Manning, Trusts and Administration, 1964 Syracuse L. Rev. 320, 321-23; Niles, *supra* note 63. Now pending in the legislature is S. Int. 844, supported by the Commission, which would revise the rule so as to allocate to income only distributions at the rate of six per cent or less.

65. Pa. Stat. tit. 20 § 3470.3 (1964), adopting the rule first applied by the Pennsylvania Supreme Court in *In re Trust Estate of Pew*, 411 Pa. 96, 191 A.2d 399 (1963). The Revised Uniform Principal and Income Act takes the "Massachusetts rule" approach. See Note, 1963 U. Ill. L.F. 473.

66. *In re Norvell's Estate*, 415 Pa. 427, 203 A.2d 538 (1964).

67. Citing *Heiner v. Donnan*, 285 U.S. 312 (1932), dealing with a statute taxing gifts made "in contemplation of death."

statute did not establish a rule of evidence, but rather a rule of substantive law.⁶⁸ Chief Justice Bell dissented.

Despite language in the will granting to the two trustees (who were also life income beneficiaries) "the power to determine how all receipts . . . shall be . . . apportioned as between income and principal" and providing that such decision should be "final and not subject to question by any court or by any beneficiary hereof," the Supreme Court of Wisconsin has held, in *In re Clarenbach's Will*,⁶⁹ that the trustees' allocation of net capital gains from sale of stock equally between income and principal was a breach of trust. Relying on the fact that at the time the will was executed Wisconsin followed the Pennsylvania rule with respect to apportionment of stock dividends, a bare majority (four-to-three) of the Wisconsin court found the testatrix to have intended her trustees to exercise "good faith judgment that a particular receipt was to be treated as either income or principal for accounting purposes."⁷⁰ The opinion has been criticized as being unduly speculative as to the testatrix's intent, and ambiguous in its holding.⁷¹ The 1963 Massachusetts case of *Tait v. Peck*,⁷² involving distribution of capital gains realized by an investment company, has also received considerable attention in the law reviews.⁷³ In a New York case,⁷⁴ an extraordinary dividend declared by a corporation formed to liquidate real property acquired in mortgage foreclosure has been held to be principal; the dividend represented gain realized on the sale of the property. The result would have been different, the court indicated, if the corporation had been a real estate trading corporation.

V

DUTY OF LOYALTY

In a recent Hawaiian case,⁷⁵ a corporate trustee had sold its own stock, held in the trust, to its president and one of its stockholders (another corporation). The sale was in violation of the terms of the trust instrument, which required the settlor's written consent to any change in investments. Upon discovering its own violation of the

68. "Here, unlike Heiner, the statute enacts into existence, not a fact, but a definition of a term theretofore subject to judicial determination." *In re Norvell's Estate*, 203 A.2d 538, 541 (Pa. 1964).

69. 23 Wis. 2d 71, 126 N.W.2d 614 (1964). Cf. *Matter of Booth's Will*, 14 N.Y.2d 554, 198 N.E.2d 38, 248 N.Y.S.2d 650 (1964) (construing "dividend in the stock of the issuing company" to exclude a true "stock split").

70. *Id.* at 76, 126 N.W.2d at 617.

71. Comments, 50 Iowa L. Rev. 656; 48 Marq. L. Rev. 262 (1964).

72. 194 N.E.2d 707 (Mass. 1963).

73. 16 Baylor L. Rev. 79 (1964); 1964 Duke L.J. 650, 18 Sw. L.J. 508 (1964).

74. *Matter of Cameron*, 42 Misc. 2d 33, 247 N.Y.S.2d 627 (Surr. Ct. 1964).

75. *Steiner v. Hawaiian Trust Co.*, 393 P.2d 96 (Hawaii 1964).

terms of the trust, the trustee sought and obtained the consent of the successor trustee, but failed to disclose the identities of the buyers. In a later action, the trustee was held liable for breach of trust as to the sales to its president, on the ground that no consent could bar such an action unless the facts showing the sale to have been a breach of the duty of undivided loyalty were fully and fairly disclosed. However, the trustee was held entitled to a new trial on the issue of whether the sale to its own shareholder was a breach of duty, because of the absence of any evidence that the shareholder exerted some control over the defendant.⁷⁶ In two other recent cases, trustees who sought to enforce their cotrustees' duties succeeded only in calling their own conduct into question.⁷⁷

VI

INVESTMENTS

Two complementary Hawaiian cases (both involving the same corporate trustee) may provide moral support for trustees uncertain of their power to apply their own best judgment in the face of restrictive trust instruments. In *Dowsett v. Hawaiian Trust Co.*,⁷⁸ an inter vivos trust instrument stated that the settlor had found the stocks constituting the initial trust res to be "satisfactory" investments, and provided that they should not be sold unless the trustee in its discretion should think it "clearly advisable because of changing conditions or other special reasons."⁷⁹ There was also an exculpatory clause relieving the trustee from liability for retention of these securities. After the proportion of market value represented by one stock in the trust portfolio, Honolulu Oil, had risen from one-third to two-thirds over a thirteen-year period, the trustee decided to sell off a large part of that investment in order to diversify and to guard against an anticipated general decline in oil stock prices. Accordingly, it sold nearly half the Honolulu Oil stock (along with another declining stock, to produce an offsetting capital loss) over a seven-year period. The trustee was held not liable for breach of trust, even though Honolulu Oil did

76. The court apparently did not mean that a finding of complete control would be necessary to support liability for breach of trust; it went on to say that "something more should appear than the mere fact of substantial holding [of stock in the defendant] by the purchaser of the trust company stock." *Id.* at 104.

77. *Richards v. Midkiff*, 396 P.2d 49 (Hawaii 1964) (plaintiff trustee apparently actuated partly by self-interest in negotiating lease he now attacks); *Matter of Grace*, 42 Misc. 2d 214, 247 N.Y.S.2d 695 (Surr. Ct. 1964) (plaintiff suing as executor participated as trustee in actions of which he tardily complains). Cf. *Page v. Page*, 243 S.C. 312, 133 S.E.2d 829 (1963), where the beneficiary's attempt to force the trustee to pay certain sums resulted only in a decision indicating indirectly that the previous trustee's action in making such payments was probably improper.

78. 393 P.2d 89 (Hawaii 1964).

79. *Id.* at 91.

not thereafter decline as anticipated, but continued to rise. Despite its broad language, the trust instrument was held not to compel the retention of the stock, but to give the trustee at least a limited discretion to dispose of it; this discretion was not shown to have been abused. In *Steiner v. Hawaiian Trust Co.*,⁸⁰ however, a surcharge was affirmed; there the trustee was found to have failed in its duty, under the "prudent man" rule, to diversify the trust investments.⁸¹ In this case the trustee's power was even more restricted; by the terms of the trust, it could not properly vary the trust investments without the written consent of the settlor. Even though the settlor had orally instructed the trustee to retain the stock in question, the Hawaii court held that the trustee was nevertheless under a duty to exercise its independent judgment as to the propriety of retention, to formally request the settlor's consent to sale if that appeared advisable, and to apply to the court for instructions if approval were denied.⁸² In the *Dowsett* and *Steiner* cases, the Supreme Court of Hawaii has created a favorable climate for the trustee's exercise of independent business judgment by showing that a decision so made will be respected, even if hindsight shows it to have been wrong, while attempts to shift responsibility to the settlor or others will meet with disfavor.

Two years ago, the Supreme Court of Pennsylvania decided *In re Brown's Estate*,⁸³ holding that a 1913 will enumerating specific permissible investments should be construed to restrict investment to those types alone, so that a later statute expanding the class of permissible investments to include common stocks was not applicable. The decision seemed to some to foreshadow a restrictive holding in Pennsylvania that a will or trust instrument specifying "legal list" investments would be read to mean only those legal at the inception of the trust.⁸⁴ In *In re Henry's Estate*,⁸⁵ however, the Pennsylvania court has now held that a will apparently meant to authorize legal investments, as well as certain enumerated others, will be read as authorizing, in addition to those enumerated, any investment that is legal *when made*.⁸⁶ The history and significance of the development of the "prudent man"

80. 393 P.2d 96 (Hawaii 1964).

81. See 3 Scott, Trusts §§ 228, 230, 230.3 (2d ed. 1956).

82. See 2 Scott, Trusts § 185 (2d ed. 1956). Although the trust was irrevocable, the settlor had retained the right to remove the trustee; the court noted that fear of removal would be no excuse for failure to perform the trustee's duty to exercise independent judgment.

83. 408 Pa. 214, 183 A.2d 307 (1962).

84. 1962 Ann. Survey Am. L. 497.

85. 413 Pa. 478, 198 A.2d 585 (1964).

86. This is apparently the usual result in other jurisdictions. See 3 Scott, Trusts § 227.13, n.6 (2d ed. 1956). Cf. *Matter of Brooks' Will*, 43 Misc. 2d 407, 251 N.Y.S.2d 52 (Surr. Ct. 1964), where a reference to statutory powers of attorney was employed.

and "legal list" approaches to trust investment have been explored in a recent article by Professor Lawrence M. Friedman.⁸⁷

Another state may have joined Minnesota⁸⁸ in allowing deviation from the plain provisions of the trust instrument to permit investment in common stocks and similar investments other than fixed-dollar obligations, where the safety of the principal appears to be endangered by a continued restrictive investment policy. In *Carlick v. Keiler*,⁸⁹ the Kentucky Court of Appeals has approved such a departure where the settlor directed in a 1913 will that the residue of his estate be converted into "good, interest-bearing securities" and placed in trust. The trustees had been investing, apparently for some time, in preferred and common stocks, and the opinion may perhaps be read as merely a strained construction, induced in part by the facts of the particular case, rather than an outright approval of deviation. The recent case involving the Duke Endowment,⁹⁰ which reached a result opposite to Minnesota's *Mayo* case,⁹¹ has received some unfavorable comment.⁹² However, a recent student note⁹³ demonstrates that the approach of the *Mayo* case, if applied automatically and without adequate examination of the duration and requirements of the trust under consideration, may produce serious inequity in the apportionment of benefits.⁹⁴

VII

INVASION OF PRINCIPAL

Despite years of sad experience,⁹⁵ the courts continue to be presented with trust instruments granting discretionary powers of invasion of principal, for "support" or other purposes, where the draftsman has failed to indicate whether the beneficiary's other sources of funds are to be considered. Two cases decided this year were in striking contrast. In one,⁹⁶ a New York court considered a provision which

87. *The Dynastic Trust*, 73 Yale L.J. 547, 551-72 (1964).

88. *In re Mayo*, 259 Minn. 91, 105 N.W.2d 900 (1960), 1961 Ann. Survey Am. L. 413-14.

89. 375 S.W.2d 397 (Ky. 1964).

90. *Cocke v. Duke Univ.*, 260 N.C. 1, 131 S.E.2d 909 (1963); 1963 Ann. Survey Am. L. 390.

91. *Supra* note 88.

92. Comments, 1964 Duke L.J. 183; 42 N.C.L. Rev. 486 (1964).

93. 113 U. Pa. L. Rev. 228 (1964).

94. A recent Rhode Island statute, amending the provision setting forth the statutory powers of trustees, would seem to authorize the court to follow the *Mayo* case where the circumstances warrant; it empowers the court to relieve trustees from restrictive language in the trust instrument where this is necessary to effectuate properly the purposes of the trust. R.I. Gen. Laws Ann. § 18-4-2 (Supp. 1964).

95. Cf. *Matter of Gatehouse*, 149 Misc. 648, 267 N.Y. Supp. 808, 809 (Surr. Ct. 1933).

96. *Matter of Aschner*, 43 Misc. 2d 809, 252 N.Y.S.2d 472 (Surr. Ct. 1964).

empowered the trustee to invade corpus to the extent it deemed "reasonably necessary" for the "proper support, maintenance, care, comfort, health, and well being" of the beneficiary, testatrix's son, who was declared to be the "primary object" of her "solicitude." Such broad language, added to the fact that the beneficiary was a judicially declared incompetent, and confined to a private sanitarium, made it easy to find an "absolute gift of support."⁹⁷ The other case, in Connecticut,⁹⁸ involved a former housemaid of the testator as beneficiary, and the direction for invasion was limited to cases where the trust income was "insufficient, by reason of serious illness or unforeseen emergency, to provide for the reasonable needs" of the beneficiary. Taking its traditional, strict approach,⁹⁹ the Connecticut Supreme Court of Errors held that the trustee could not invade principal until the beneficiary had "substantially, although not literally" exhausted all her other assets—both income and principal—except her home.

Two cases involved liability to third parties: in one, the New York Court of Appeals affirmed a decision directing payment to Monroe County for hospital care furnished the settlor before her death, despite the fact that the settlor herself had refused to authorize such payments during her life;¹⁰⁰ in the other,¹⁰¹ the Supreme Judicial Court of Massachusetts held that the town of Randolph had no right to compel payments from the principal of a small discretionary trust, even though the beneficiary was currently receiving disability payments from the town welfare authority.¹⁰²

VIII

POWER OF SALE

The hazards facing a trustee in deciding whether to exercise a power to sell trust property—and how to do so—have been graphically re-emphasized by the Supreme Court's affirmance of the decision in *Pennsylvania Co. v. Wilmington Trust Co.*,¹⁰³ discussed in last year's survey,¹⁰⁴ which surcharged a trust company for \$500,000 paid in settlement of a claim growing out of its withdrawal from a proposed sale

97. The court did hold, however, that fees and expenses incurred in securing the appointment of a committee for the beneficiary need not be paid from the trust.

98. *Frey v. Greenberg*, 151 Conn. 663, 202 A.2d 142 (1964).

99. *Guaranty Trust Co. v. New York City Cancer Comm.*, 145 Conn. 542, 144 A.2d 535 (1958); see Halbach, *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1425, 1444-45 (1961).

100. *Matter of Luscher*, 14 N.Y.2d 602, 198 N.E.2d 264, 248 N.Y.S.2d 887 (1964).

101. *Randolph v. Roberts*, 195 N.E.2d 72 (Mass. 1964).

102. But cf. *Matter of van Gaalen's Estate*, 38 Misc. 2d 853, 239 N.Y.S.2d 312 (Surr. Ct. 1963), 1963 Ann. Survey Am. L. 391.

103. 186 A.2d 751 (Del. Ch. 1962), 189 A.2d 679 (Del. Ch. 1963), *aff'd sub nom. Wilmington Trust Co. v. Coulter*, 200 A.2d 441 (Del. 1964).

104. 1963 Ann. Survey Am. L. 392-94.

of trust assets (shares of railroad stock). Although the surcharge was confirmed, the grounds on which it rested were considerably narrowed in the appellate court's decision. The Chancery Court had held that the trust company was negligent in its original negotiation of the earlier agreement of sale, as well as in its failure to withdraw from that agreement as soon as a higher price was offered and in failing to consult with the cotrustee with respect to the higher offer as soon as that was communicated. The Delaware Supreme Court held that the negotiation of the original sale agreement could not be held an unreasonable exercise of the trustees' business judgment in the light of the circumstances known to them,¹⁰⁵ and also indicated some doubt as to whether the failure immediately to withdraw from that earlier agreement of sale was necessarily negligent either;¹⁰⁶ instead, its affirmance was squarely rested on the trust company's failure to notify its cotrustee as soon as a significantly higher price was offered.¹⁰⁷ On reargument, the court added that the trust company had also been negligent in failing to "reconsider" the sale when a higher offer was made. The opinion is rather unsatisfactory, in that the question of whether the original agreement of sale actually was binding on the trustees at the time of the actions complained of seems not to have been argued until the appeal. The court seems to hold, in effect, that a trustee must, in selling trust property, "hold the line" and continue (or reopen) negotiations whenever a better offer is received, unless the binding nature of existing arrangements is certain beyond reasonable doubt. Such a holding seems to place a heavy burden on a trustee in any private sale.¹⁰⁸

In a recent New York decision,¹⁰⁹ testamentary trustees were absolved from liability where they sold trust assets for cash (thereby

105. "We cannot avoid a feeling that the Trust Company's action . . . is attacked as improvident because of later developments, but this may not be done. Its conduct is to be judged in terms of the facts as they were known on April 15 and not in terms of later developments which, apparently, took all concerned by surprise." *Wilmington Trust Co. v. Coulter*, *supra* note 103, at 448.

106. "We think . . . that it is not altogether clear that the Trust Company's contention is wholly without merit. . . . It cannot be said that the Trust Company's fears of adverse effects flowing from a withdrawal are completely without merit." *Id.* at 451.

107. At that time the cotrustee still had not given his consent in writing to the proposed agreement, a prerequisite to the consummation of the sale. The cotrustee did not testify.

108. The Pennsylvania Railroad Company, the prospective buyer, "at all times has insisted that the April 15 agreement was a binding commitment." *Id.* at 450. Accordingly, it seems unlikely that the full \$500,000 settlement was caused by the trust company's negligence; even if the trustees had immediately renounced the earlier agreement, there might well have been litigation, with attorney's fees and at least some settlement cost, or else another sale contract to the same party with the increased sale price reduced, in effect, by the cost of an accompanying release.

109. *Matter of Kurrus*, 42 Misc. 2d 832, 249 N.Y.S.2d 272 (Surr. Ct. 1964).

incurring a sizable capital gain) and distributed the proceeds, rather than making a distribution in kind, a procedure which some of the remaindermen claimed had resulted in the loss to them of a potential tax benefit. The court felt that, under the circumstances, the trustees were justified in not waiting to see if all beneficiaries might agree to a distribution in kind.¹¹⁰

IX

CHARITABLE TRUSTS

Several cases presented problems of accumulation. In Pennsylvania, a charitable trust was created by a will which provided that stated portions of the trust income were to be paid to the beneficiary, a Masonic home, at twenty-year intervals, while the remaining income was to be accumulated and paid, together with the principal, at the end of 400 years after the testator's death.¹¹¹ Because the Pennsylvania statute restricting accumulation specifically exempts accumulations for charitable purposes,¹¹² the lower court felt bound to apply the will as written.¹¹³ The Pennsylvania Supreme Court reversed, however, on the ground that courts of equity have inherent authority to judge the reasonableness of such a provision (and particularly in light of the policy of the statute).¹¹⁴ Here the testator had demonstrated no reason for his expressed plan of accumulation,¹¹⁵ so the court found it void, directing instead that the income be paid to the charitable beneficiary "on a current basis."¹¹⁶ In a California case¹¹⁷ the will in dispute declared that a trust should be formed "payable as a reward to the person who decides the cause of Rhomatoid [*sic*] Arthritis and a cure for the same."¹¹⁸ A district court of appeal, reversing the trial court, held that although the trust would have failed as a private trust because of lack of an identifiable beneficiary and remoteness of vesting, its charitable nature would render it valid against such objections. The court rightly holds that the mere fact that a single individual may be the only direct pecuniary beneficiary of the trust does not prevent its being a valid trust for charitable purposes;¹¹⁹ the court does not, how-

110. Cf. *In re Wellman Estate*, 119 Vt. 426, 127 A.2d 279 (1956).

111. *In re James' Estate*, 414 Pa. 80, 199 A.2d 275 (1964). Estimates of the accumulated worth of the trust at the time of its termination in 2360, if administered as provided in the will, varied (depending on the interest rate employed) from \$14,411,000 to \$19,242,724,745. *Id.* at 84, n.1, 199 A.2d at 276-77 n.1.

112. 20 Pa. Stat. Ann. 301.6(b)(1) (Supp. 1964).

113. *In re James' Estate*, *supra* note 111, at 85, 199 A.2d at 277.

114. See Scott, *Trusts* § 401.9 (2d ed. 1956).

115. Compare *Franklin Foundation v. Attorney Gen.*, 340 Mass. 197, 163 N.E.2d 662 (1960), where a direction to accumulate income for a 200-year period was upheld.

116. *In re James' Estate*, *supra* note 111, at 91, 199 A.2d at 280.

117. *In re McKenzie's Estate*, 38 Cal. Rptr. 496 (Dist. Ct. App. 1964).

118. *Id.* at 497.

119. The court relies on *Sheen v. Sheen*, 126 N.J. Eq. 132, 8 A.2d 136 (1939), and

ever, deal squarely with the question of whether there has already been—or will ever be—any vesting of this gift in a charity.¹²⁰ In Connecticut, a bequest to a cemetery corporation was reduced by the court from \$15,000 to \$3,000, where it appeared that the former sum was far in excess of the amount required to produce income sufficient for perpetual care of a cemetery plot, the only purpose of the gift.¹²¹

The doctrine of cy pres was applied in several cases.¹²² In Georgia, the Supreme Court has approved a lower court decision which followed the lead of the *Girard College* case¹²³ by permitting the City of Macon to resign as trustee in order that the trust might continue to operate its park for the use of white residents only.¹²⁴

It is commonly held that a private individual or organization does not (absent some "special interest") have standing to enforce a charitable trust merely because the proper performance of the trust might result in some direct pecuniary benefit to him, the power of enforcement of such trusts being in the Attorney General, or similar official, on behalf of the public.¹²⁵ However, one cotrustee may bring action to

Matter of Judd's Estate, 242 App. Div. 389, 274 N.Y. Supp. 902 (1st Dep't 1934); there, however, periodic prizes for outstanding achievement in particular endeavors were provided for, while in the instant case there is no assurance that any disposition of the principal will ever be made.

120. The court acknowledges that certain problems may require action at a future date, including the accumulation of income and the determination of a beneficiary. (One person might not be the discoverer of both the cause and the cure.)

121. *Clark v. Portland Burying Ground Ass'n*, 151 Conn. 527, 200 A.2d 468 (1964). The court was careful to point out that the cemetery corporation had no claim to the excess either on the ground of cy pres or otherwise; the gift involved was not even a true trust but was made pursuant to statute exempting such a gift from the rule against perpetuities. The court saw no other practical way to avoid a purposeless perpetual accumulation of excess income than simply to hold part of the gift invalid as being in violation of the statute.

122. *Smith v. Moore*, 225 F. Supp. 434 (E.D. Va. 1963) (holding that Virginia courts would apply cy pres to a trust created before the present statute was enacted); *Rogers v. Attorney Gen.*, 196 N.E.2d 855 (Mass. 1964); *Matter of Nellis Athletic Fund*, 42 Misc. 2d 121, 247 N.Y.S.2d 752 (Surr. Ct. 1964). See also *Comments*, 16 Ala. L. Rev. 428 (1964), 17 Vand. L. Rev. 633 (1964). See also *Reed v. Eagleton*, 384 S.W.2d 578 (Mo. 1964) (not true cy pres; merely an instance of deviation necessary to carry out the original trust purpose).

123. *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, cert. denied, 347 U.S. 570, motion for rehearing denied, 358 U.S. 858 (1958).

124. *Evans v. Newton*, 220 Ga. 280, 138 S.E.2d 573 (1964) cert granted, 33 U.S.L. Week 3349 (U.S. April 27, 1965). In *Smith v. Moore*, supra note 122, the testator's expressed intent (in a 1910 will) that trust funds be used to benefit "worthy white persons" was held subordinate to his expressed general charitable intent, so that if the application of cy pres should result in trust funds being used by nonsegregated hospitals, the trust would not thereby be violated.

125. *Restatement (Second), Trusts* § 391 (1959); *Scott, Trusts* § 391 (2d ed. 1956). Recent cases affirm this principle. *Sister Elizabeth Kenny Foundation, Inc. v. National Foundation*, 126 N.W.2d 640 (Minn. 1964); *In re Nevil's Estate*, 414 Pa. 122, 199 A.2d 419 (1964) (both denying standing to organizations which might benefit after the application of cy pres).

enjoin violation of a trust, whether private¹²⁶ or charitable.¹²⁷ In a recent California case,¹²⁸ the Supreme Court (in a persuasive opinion by Justice Traynor) extended this latter principle to permit suit by minority "trustees"¹²⁹ of a charitable corporation to enjoin an alleged threatened breach of trust by the majority of the board of trustees. Justice McComb dissented on the ground that the California statutes do not permit anyone but the Attorney General or a "member" of such a corporation to bring such action.¹³⁰

A recent Texas case¹³¹ involved a bequest in trust for the establishment and maintenance of a hospital of a type (apparently chiropractic) which is illegal in Texas—the state of the decedent's domicile, the location of the trust property (apparently both realty and personalty) and the trustees' residence, and the place where the trust is to be administered. However, the will apparently provided that the hospital might be established in California, where such hospitals are not unlawful. The Texas Court of Civil Appeals, reversing the trial judge, held that Texas law governed the trust, and that Texas public policy forbade the employment of trust proceeds for the stated purpose. (The court did not pass on what, if anything, the trustees were empowered to do instead.) The case has been criticized as unnecessarily violative of the testator's intent in a situation where such intent could have been adhered to, had the court been so minded.¹³²

X

CONSTRUCTIVE AND RESULTING TRUSTS

As usual, many cases involved the assertion of constructive and resulting trusts, but most were of only routine importance. The New Jersey Supreme Court utilized the constructive trust as a remedial device in an unusual situation arising out of a defective tax sale fore-

126. Restatement (Second), Trusts § 200, comment e (1959).

127. *Id.* § 391. Cf. *Richards v. Midkiff*, *supra* note 77.

128. *Holt v. College of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 40 Cal. Rptr. 244 (1964).

129. Although bearing the title of trustees, the plaintiffs were apparently only members of a board of directors; the corporation itself held title to any trust property, and was the true "trustee." 394 P.2d at 937, 40 Cal. Rptr. at 249.

130. 394 P.2d at 939, 40 Cal. Rptr. at 251. The Attorney General's opposition to the action merely strengthened the majority's opinion that effective enforcement of such trusts would best be served by expansion of the class of persons by whom enforcement might be sought. 394 P.2d at 936, 40 Cal. Rptr. at 248.

131. *Wilson v. Smith*, 373 S.W.2d 514 (Tex. Civ. App. 1963), application for writ of error denied.

132. Comment, 39 Notre Dame Law. 614 (1964).

closure,¹³³ and the "slayer's bounty" was at issue in two cases,¹³⁴ both of which arose from the murder of one co-owner by the other, followed by the suicide of the murderer-survivor.¹³⁵ Other cases concerning constructive¹³⁶ and resulting¹³⁷ trusts are noted below.

133. *Bron v. Weintraub*, 42 N.J. 87, 199 A.2d 625 (1964) (constructive trust for benefit of occupants imposed upon purchaser of outstanding interest, subject to reimbursement for his purchase price).

134. In *Whitfield v. Flaherty*, 39 Cal. Rptr. 857 (Dist. Ct. App. 1964), the murder victim had named her stepson, the son of the murderer, as secondary beneficiary of her will, with the result that the stepson—who was also the sole beneficiary of his father's will—was entitled to all the jointly held property, regardless of which rule applied. In *Hargrove v. Taylor*, 389 P.2d 36 (Ore. 1964), the court adopted the Restatement rule giving to the murdering tenant by the entirety only a severed life estate in his half. See Restatement, Restitution § 188 (1937).

135. See 4 Scott, Trusts § 493.2 (2d ed. 1956).

136. Constructive trust impressed: *Hardy v. Hardy*, 235 F. Supp. 208 (D.D.C. 1964) (divorcing wife declared constructive trustee of funds saved from household expense money); *Fowler v. Fowler*, 39 Cal. Rptr. 101 (Dist. Ct. App. 1964) (husband constructive trustee to the extent of money advanced by plaintiff toward property purchase and improvements before their marriage); *Briggs v. Nilson*, 38 Cal. Rptr. 68 (Dist. Ct. App. 1964) (mother constructive trustee for daughter on breach of oral promise to reconvey); *Loschen v. Clark*, 127 N.W.2d 600 (Neb. 1964) (daughter's divorced husband constructive trustee for father on breach of promise to support).

No constructive trust impressed: *Almada v. Ruelas*, 96 Ariz. 155, 393 P.2d 254 (1964) (mother-daughter relationship but no showing of promise to reconvey); *Tarpoff v. Karandjeff*, 51 Ill. App. 2d 454, 201 N.E.2d 549 (1964) (sufficient showing of full disclosure where one partner purchased the other's interest in joint property); *Sutton v. Sandler*, 18 App. Div. 2d 362, 239 N.Y.S.2d 389 (1st Dep't), aff'd, 13 N.Y.2d 1007, 195 N.E.2d 303, 245 N.Y.S.2d 591 (1964) (three judges dissenting) (attempt to avoid Statute of Frauds by using constructive trust theory); 32 Fordham L. Rev. 855, 50 Va. L. Rev. 933 (1964).

137. *Sugg v. Morris*, 392 P.2d 313 (Alaska 1964) (plaintiff failed to meet burden of showing amount of her contribution to purchase price); *Grapes v. Mitchell*, 159 So. 2d 465 (Fla. 1964) (resulting trust imposed on proceeds of land conveyed to defendant's decedent for management and sale); *Stevens v. Stevens*, 244 S.C. 113, 135 S.E.2d 725 (1964) (presumption of gift to wife not rebutted by husband).